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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6446

DATE COMPLAINT FILED: December 21, 2010

DATE OF NOTIFICATION: December 28, 2010

LAST RESPONSE RECEIVED: March 9, 2010

DATE ACTIVATED: April 8, 2011

EXPIRATION OF SOL: Earliest October 12, 2015
Latest October 12, 2015

COMPLAINANT:

Lynnelle Kummelehne

RESPONDENTS:

Congressman Peter DeFazio
DeFazio for Congress and Robert Ackerman, in his
official capacity as treasurer
Coos Bay-North Bend Rotary International Club

RELEVANT STATUTES AND :
REGULATIONS

2 U.S.C. § 434(b)
2 U.S.C. § 441b(a)
11 C.F.R. § 114.4(c)(6)

INTERNAL REPORTS CHECKED:

none

FEDERAL AGENCIES CHECKED:

none

I. INTRODUCTION

This complaint concerns the appearance of Congressman Peter DeFazio, a federal officeholder and federal candidate, at the October members-only meeting of the Rotary Club of Coos Bay-North Bend, Oregon ("the Club"), a 501(c)(4) corporation, shortly before the 2010 general election. The complaint states that on "October 12, 2010, Rep. Peter DeFazio was the special speaker and appeared to be a willing participant at a partisan event/luncheon where he was sponsored, endorsed, and/or promoted by The Coos Bay-North Bend, OR, Rotary International Club, with a 501(c)(3) status." See Complaint at 2. The complaint asserts that the

1 Club is a 501(c)(3) organization and that Rep. DeFazio's appearance before the Club was
2 campaign-related, and therefore alleges that hosting DeFazio's appearance was prohibited by the
3 Internal Revenue Code. See Complaint at 1. While the complaint does not cite any portions of
4 the Federal Election Campaign Act of 1971, as amended ("the Act"), it generally alleges that the
5 endorsement and the costs associated with the "endorsement" Club meeting were in-kind
6 contributions to the DeFazio campaign by the Rotary Club.

7 A review of the information provided indicates that the Club is not a 501(c)(3)
8 organization, and therefore Complainant's allegations regarding limitations, from whatever
9 source, on 501(c)(3) organizations do not appear to apply. While 2 U.S.C. § 441b(a) bars all
10 corporations, such as the Club, from making in-kind contributions to a candidate, corporations
11 are permitted to endorse candidates to their restricted class, and to host appearances by federal
12 officeholders. The available information also indicates that the Club did not endorse DeFazio by
13 means of his appearance, that the Club did not expressly advocate for DeFazio's re-election, that
14 DeFazio's presentation involved a discussion of transportation legislation important to the Coos
15 Bay-North Bend area rather than campaign-related topics, and that therefore the appearance did
16 not generate prohibited in-kind contributions from the Club to DeFazio or DeFazio for Congress
17 and Robert Ackerman, in his official capacity as treasurer, ("the Committee.") We recommend
18 that the Commission find no reason to believe that the Coos Bay-North Bend Rotary Club or
19 DeFazio for Congress and Robert Ackerman, in his official capacity as treasurer, violated the
20 Federal Election Campaign Act of 1971, as amended ("the Act").

II. FACTUAL BACKGROUND

Congressman Peter DeFazio has represented the congressional district that encompasses Coos Bay and North Bend, Oregon, from the time of his initial election in 1986. In virtually identical responses, Rep. DeFazio and the Committee state that DeFazio often speaks at Rotary meetings throughout his district, and that he has "attended 43 Rotary Club gatherings including at the Bay Area Rotary in the last 10 years." See Committee Response at 1. DeFazio notes that the Club contacted his congressional office regarding his availability to speak in early October 2010, that his district scheduler confirmed his availability with the Club on October 8, 2010, and that his presentation on October 12, 2010 focused on transportation projects, including a six-year transportation reauthorization bill DeFazio authored. See DeFazio Response at 1. Local news coverage of his presentation notes the transportation focus of DeFazio's remarks. See Erica Rush, "DeFazio: Timing is everything for Rail Service," posted on the website of KCBY 11 on October 12, 2010 (Attachment A to the DeFazio Response.) Rep. DeFazio and the Committee also state that the Club did not "display Mr. DeFazio's campaign signs, distribute information about my candidacy, or treat this as a campaign event," and the Responses included photos indicating the lack of campaign materials at the event. See Committee Response at 2 and Attached Photos 1-4, (showing lunch tables, the speaker's podium, and a display screen.)

Complainant attended the Club's meeting on October 12, 2010, though according to the Club's response, she is not a Club member, nor was she a guest of a Rotarian, and the meeting was not open to the public. See Club Response at 2. It appears that Complainant attended the meeting because she was concerned about DeFazio's appearance, as she had previously contacted the Club's president, Jim Molitor, regarding her frustration about the Club's rejection

1 of a campaign appearance by a surrogate for Art Robinson, DeFazio's opponent in the general
2 election. Complainant states in her complaint that

3 it is my understanding that The Coos Bay-North Bend Rotary International Club
4 Board had committed to share their September 14, 2010 meeting with "The
5 American Exceptionalism Tour" with renowned Astronaut Scott Carpenter
6 campaigning for Art Robinson for Congress. ... However, just days before the
7 scheduled event, President Jim Molitor called and cancelled due to 'the Board and
8 Rotary's Bi-Laws state they cannot be involved in anything political.'

9
10 Complaint at 3-4.

11 The complaint states generally that there were "several partisan acclamations in support
12 of Rep. DeFazio from the Rotary Board, members and guests during the partisan event," but
13 gives no indication of what these "acclamations" were.¹ See Complaint at 3. The complaint also
14 acknowledges that "as a sitting Congressman, [Rep. DeFazio] could have spoken ... to 'share his
15 expertise on another subject,' but states Complainant's perspective that "[t]he whole meeting
16 was all about Rep. DeFazio! He applauded himself for the great work he's done and is now
17 doing and why it is so important for him to continue his progress next term. He clearly implied
18 'VOTE FOR ME!'" See Complaint at 3.

19 After leaving the meeting, Complainant wrote a letter to the Club and to Rep. DeFazio
20 regarding her concerns about his appearance.² See Complaint at 4 and Complaint Attachment 1,

¹ Complainant asserted in the Complaint that she voice-recorded the meeting, but did not include a recording with her submission or quote from the alleged recording in her Complaint. See Complaint at 5.

² That letter (and the Complaint to the Commission) appears to rely on information Complainant obtained from a fact sheet published by the Alliance for Justice, an association of over 100 non-profit organizations involved in advocating for the rights of various groups. See <http://www.afj.org/about-afj/>, (last visited July 6, 2011.) In the letter, Complainant quotes a portion of the Alliance for Justice ("AFJ") Fact Sheet (see attached as Attachment 1) on which her allegations rely, in which the AFJ advised its non-profit member organizations that

A 501(c)(3) may NOT host a *federal* candidate's appearance that is campaign-related because doing so would provide a beneficial opportunity for the candidate to address the public, equal to an in-kind contribution, which is impermissible for a 501(c)(3). The only exception to this general rule ... is where the 501(c)(3) is hosting a candidate debate with at least two candidates and the debate is nonpartisan in nature. (Emphasis in original.)

1 "My Letter," dated October 17, 2010. Subsequently, Complainant filed the complaint in this
2 matter.³

3 In response to the Complaint, the Coos Bay-North Bend Rotary Club states that it is not a
4 501(c)(3) organization, it is in fact a 501(c)(4) organization, and "it is not inconsistent with the
5 purpose of the ... club ... for a local Rotary club to host a meeting for members during which a
6 currently-serving legislator provides information to the membership on topics that concern the
7 community, such as that status of current legislative activities. In doing so, the club does not
8 advocate any particular position, though under the 501(c)(4) rules, it may." *See Club Response*
9 at 1-2 and Exhibit 1 (a 1998 letter from Rotary International personnel stating that Rotary
10 International is a 501(c)(4) organization and the Coos Bay Club has been a member club since
11 1922.) The Club's response states that the "October 12, 2010 Club meeting was not open to the
12 public," and was a meeting for Club members. *See Club Response* at 2 and Affidavit of
13 President James Molitor, attached to the Response as Exhibit 3.

14 The Club noted that DeFazio's appearance was not campaign-related, but rather it
15 focused on a general legislative update, not on the upcoming election. *Club Response* at 2. The
16 Club also notes that, in contrast to the non-partisan officeholder appearance of Rep. DeFazio, it
17 refused the previously-requested appearance by Art Robinson's campaign surrogate, astronaut
18 Scott Carpenter, "after learning of the partisan nature of Mr. Carpenter's presentation." *Club*
19 *Response* at 2. DeFazio's response explicitly denies that the Club endorsed his candidacy.⁴ *See*
20 DeFazio response at 1-2.

³ Complainant originally filed a complaint on November 18, 2010, but that complaint was improper because it was not notarized or sworn. After CELA consulted with Complainant, she filed a somewhat different complaint on December 21, 2010 that met the Commission's requirements.

⁴ Curiously, DeFazio's campaign's response argues that the Coos Bay-North Bend Rotary Club is a 501(c)(6) organization, which is the I.R.S. designation for business leagues and Chambers of Commerce.

III. LEGAL ANALYSIS

The complaint alleges that the Club made contributions when it allegedly endorsed DeFazio and when it provided facilities and resources for a campaign-related appearance at the members' meeting. It is unlawful for any corporation to make a contribution in connection with any election to any political office, or for any candidate [or] political committee to knowingly accept or receive any corporate contribution. 2 U.S.C. § 441b(a). Further, each disclosure report required by the Commission shall disclose the total amount of all receipts, including the identification of each person who makes a contribution to the reporting authorized committee, whose contributions have an aggregate value in excess of \$200 per election cycle. 2 U.S.C. § 434(b). Therefore, because the Club is incorporated, if the Club made, and DeFazio and the Committee accepted, in-kind contributions in connection with the event, each would have violated 2 U.S.C. § 441b(a) by making and accepting, respectively, the prohibited contributions. Further, the Committee would have been required to report those contributions pursuant to 2 U.S.C. § 434(b). However, the available information indicates that DeFazio's presentation to the Club was a permissible officeholder appearance, that the Club did not endorse DeFazio during his appearance, and therefore DeFazio's appearance did not generate an impermissible in-kind corporate contribution from the Club to the DeFazio Committee.

With regard to the alleged endorsement, the Club and DeFazio deny that the Club endorsed DeFazio during his appearance, and the available information appears to support that assertion. See DeFazio Response at 1-2 and at Attachment A. The Club has also provided information supporting its representation that it is a 501(c)(4) organization, and therefore is not restricted by IRS regulations pertaining to 501(c)(3) corporations. See Club Response at 1 and Exhibit 1. Even if the Club had endorsed DeFazio, or if there is an inference that there was an

1 implicit endorsement through his appearance just prior to the election, the Act and Commission
2 regulations do not prohibit a corporation such as the Rotary Club from endorsing a candidate
3 during a candidate appearance before its restricted class, except to the extent that such activity is
4 foreclosed by provisions of law other than the Act. See 11 C.F.R. §§ 114.2(a)(1) and
5 114.4(c)(6).

6 A corporation is explicitly allowed to endorse a candidate, communicate that
7 endorsement to its restricted class, and publicly announce the endorsement and the reasons for it.
8 11 C.F.R. § 114.4(c)(6). As the Club appears to be a membership organization as defined in
9 11 C.F.R. § 114.1(e), its restricted class would be its members, executive or administrative
10 personnel, and their families, as set forth in 11 C.F.R. § 114.1(j). The Club's response indicated
11 that the monthly member's meeting was closed to the public, and was a meeting for members to
12 interact with their sitting Congressman regarding legislative issues, so it appears that the
13 presentation was made to the Club's restricted class as required for application of 11 C.F.R.
14 § 114.4(c)(6).³ Further, 11 C.F.R. § 114.2(c) states that disbursements by corporations for the
15 election-related activities permitted in 11 C.F.R. § 114.4 "will not cause those activities to be
16 contributions or expenditures, even when coordinated with any candidate, candidate's agent, [or]
17 candidate's authorized committee..." See 11 C.F.R. § 114.2(c). Therefore, even if the Club had
18 endorsed DeFazio during his appearance before the Club's restricted class, it appears that such
19 an endorsement would have been permissible under the Commission's regulations, and would
20 not have generated a prohibited corporate contribution to the DeFazio for Congress Committee.

³ 11 C.F.R. § 114.4(c)(6) cautions that 26 U.S.C. § 501(c)(3) organizations should consult the Internal Revenue Code regarding any restrictions or prohibitions. As available information suggests that the Club is not a 501(c)(3) organization, that caution would not apply to it.

1 Separate from the endorsement argument discussed above, the complaint suggests that
2 the Club made a more general in-kind contribution to the DeFazio Committee by using Club
3 resources to host his appearance. The complaint states the Club "made a political contribution to
4 a candidate, Rep. Peter DeFazio. (TIME=CONTRIBUTION=MONEY). ... [The Club] used
5 facilities for candidate, Rep. Peter DeFazio's endorsement." See Complaint at 2. Commission
6 regulations permit extensive political communications by a corporation to its restricted class,
7 which the attendees at the Club's members' meeting appeared to be. 11 C.F.R. § 114.3(e)(2).
8 See discussion on p.7, *supra*. In fact, a candidate may address a corporation's restricted class at
9 a meeting and even solicit contributions at the meeting, while the corporation may bar other
10 candidates for the same office from the same opportunities. See 11 C.F.R. § 114.3(c)(2).⁶ Thus,
11 DeFazio's appearance before the Club's restricted class was permissible under the Act and did
12 not generate prohibited corporate contributions, even if DeFazio made his appearance as a
13 candidate, which the available information indicates was not the case.⁷

⁶ Only if the costs for such communications or appearances exceed \$2,000 per election do such costs need to be reported to the Commission on FEC Form 7. See 11 C.F.R. § 100.134(a).

⁷ Even if Complainant's secondary argument is understood to be an allegation that DeFazio's appearance was a public appearance by DeFazio sponsored by the Club, such as appearance by a current officeholder as an officeholder is permissible under the Act and Commission regulations. *The Campaign Guide for Corporations and Labor Unions* (2007) at p. 34 states that a corporation may sponsor an appearance before the public by an officeholder without generating prohibited corporate contributions under certain circumstances, citing Advisory Opinions 2004-14, 1999-2, 1996-11 and 1992-6:

This type of appearance can occur under the following circumstances: The speaker is NOT appearing in his capacity as a federal candidate but rather as a current federal officeholder or as a lecturer. The speaker may speak about issues of interest to the sponsoring organization, including legislative issues, but must avoid reference to the campaign. Neither the speaker nor the corporation or labor organization may expressly advocate the election or defeat of a clearly identified candidate. Neither the speaker nor the corporation or labor organization may solicit contributions before, during or after the event. Corporations and labor organizations need not provide other candidates with similar opportunities to speak because the speaker is appearing in his/her professional capacity rather than as a candidate. The appearance may occur at any time, even shortly before an election, because the speaker is appearing in his/her professional capacity rather than as a candidate. (Emphasis in original, topic headings omitted).

1 Therefore, despite the complaint's general allegations that DeFazio's appearance at the
2 Club's meeting resulted in a contribution, the available information indicates that DeFazio's
3 presentation to the Club was a permissible officeholder appearance and did not generate an
4 impermissible in-kind corporate contribution from the Club to the DeFazio Committee.
5 Accordingly, we recommend that the Commission find no reason to believe that the Rotary Club
6 of Coos Bay-North Bend, Oregon, Peter DeFazio, or DeFazio for Congress and Robert
7 Ackerman, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a) by permitting Rep.
8 DeFazio to make a non-campaign-related officeholder appearance at the Club's October 2010
9 membership meeting, or that DeFazio for Congress and Robert Ackerman, in his official
10 capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report a contribution.

11 **IV. RECOMMENDATIONS**

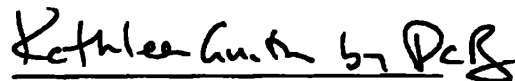
- 12
13 1. Find no reason to believe that the Rotary Club of Coos Bay-North Bend, Oregon,
14 Peter DeFazio, or DeFazio for Congress and Robert Ackerman, in his official
15 capacity as treasurer, violated 2 U.S.C. § 441b(a);
16
17 2. Find no reason to believe that DeFazio for Congress and Robert Ackerman, in his
18 official capacity as treasurer, violated 2 U.S.C. § 434(b);
19
20 3. Approve the attached Factual and Legal Analyses;

4. Approve the appropriate letters; and

5. Close the file.

Date

7/7/11



Kathleen Guith
Acting Associate General Counsel



Peter G. Blumberg
Assistant General Counsel



Audra Hale-Maddox
Attorney

Attachments:

1. Alliance for Justice Fact Sheet



Election Year Advocacy: Candidate Forums

How can 501(c)(3) organizations keep their issues in the minds of voters during an election year?

501(c)(3) organizations are prohibited from supporting or opposing a candidate or a political party, however there are many ways public charities can remain on message and involved during an election year. Here are a few guidelines for hosting events that candidates will attend.

Under federal tax law, 501(c)(3) organizations may host candidate appearances. A candidate appearance is a forum where the candidate has an opportunity to speak to the public. These appearances usually provide an opportunity for candidates to craft their own message. The audience for these appearances can be limited by the organization. For example, an organization may invite candidates to speak at their fundraising event, at a members-only meeting, or at an event that they publicize to the organization's supporters.

There are two reasons you would invite a candidate to your event: either because they are a candidate or because they have some expertise that you want to share with your audience. A different set of rules applies to each situation.

When you invite a candidate because of their candidacy, keep the following guidelines in mind:

Federal Tax Law:

Under Federal Tax Law, 501(c)(3)s may host a candidate forum where the candidate is invited because of their candidacy, however:

- There must be no indication of support or opposition to the candidate at the event.
- There should be no political fundraising.
- You must offer all of the other candidates an opportunity to appear at the event. These appearances do not have to be at the same time; however, there can be *no contextual favoritism*. In other words, don't invite one candidate to your conference to speak at 8 p.m. on Friday and another candidate to speak at 8 a.m. on Sunday.

Federal Election Law:

If the candidate is a candidate for federal office you must also keep in mind restrictions under federal election law. A 501(c)(3) may NOT host a federal candidate's appearance that is campaign-related because doing so would provide a beneficial opportunity for the candidate to address the public, equal to an in-kind contribution, which is impermissible for a 501(c)(3). The only exception to this general rule for 501(c)(3) organizations is when the 501(c)(3) is hosting a candidate debate with at least two candidates and the debate is nonpartisan in nature. FEC regulations permit 501(c)(3)s that do not endorse, support or oppose candidates or parties to stage candidate debates as long as the debates have at least two candidates present, the event is unbiased, the candidates are given equal opportunity to speak, there is an unbiased moderator and audience and no bias exists in the preparation and presentation of questions.

When you invite a candidate for reasons not associated with their candidacy, remember the following:

Federal Tax Law:

If individuals are being invited to speak in a capacity outside of their candidacy, there is no requirement for equal opportunity.

- For example, Dr. Senator is the speaker at your organization's annual fundraiser. Dr. Senator is an expert in early childhood development and pioneered supplemental nutrition programs for schools in your community. Dr. Senator is being asked to speak as a preeminent advocate of changing educational standards to enhance childhood learning. Dr. Senator is not being invited due to her position as a Senator even though she is running for re-election. Therefore, there is no need to extend an invitation to other candidates.

Tell the individual that they cannot mention their candidacy. Write a letter to the individual detailing the reason your organization is inviting them. Tell them it is not a candidate event and that they cannot mention their candidacy. The memo should also state that your organization is a nonpartisan 501(c)(3) organization that does not support, or oppose, candidates for office.

ATTACHMENT 1

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Do not time this appearance to coincide with an election. The closer you are to an election the more it looks like you are inviting the individual as a candidate versus for some expertise.

If your annual fundraiser is held in May, do not change the event to October. This is too close to the election and would give the appearance that you are supporting her candidacy.

Federal Election Law:

Under Federal Election Law, if the federal candidate forum or event is not political in nature, there is no FEC regulation prohibiting a 501(c)(3) from hosting the event. It is important however for non-political events where a candidate will appear, for the 501(c)(3) organization to ensure that the candidate is aware that it is not a campaign event. The candidate cannot solicit votes or raise money, and no political banners, placards or other signs of their candidacy should be displayed.

*****Please consult state election law for rules and restrictions governing 501(c)(3) events involving state candidates.**

The information contained in this fact sheet and any attachments is being provided for informational purposes only and not as part of an attorney-client relationship. The information is not a substitute for expert legal, tax, or other professional advice tailored to your specific circumstances, and may not be relied upon for the purposes of avoiding any penalties that may be imposed under the Internal Revenue Code. The Alliance for Justice publishes plain-language guides on nonprofit advocacy topics, offers educational workshops on the laws governing the advocacy of nonprofits, and provides technical assistance for nonprofits engaging in advocacy. For additional information, please feel free to contact the Alliance for Justice.

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